

# MEMORANDUM

DATE: June 13, 2006

TO: Oil Spill Advisory Council

FROM: Federal Funding Technical Advisory Committee

SUBJECT: Statement of Work

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## **I. Composition of Federal Funding Technical Advisory Committee**

This Technical Advisory Committee (“TAC”) is comprised of Phil Winberry, Council Member and Chair; Maura Brueger, Council Member; Kennie Endleman, Representative Jay Inslee’s Office; Eric Johnson, Washington Public Ports Association (“WPPA”); and Thornton (Cholly) Mercer, Rainier Petroleum Corporation and Jacqui Brown Miller, Council staff.

## **II. Committee’s Scope of Work**

The Federal Funding TAC has been charged with three tasks:

1. Identify and differentiate between federal spill prevention activities that are required or authorized under law, but are not being effectively performed—both under federal statute and federal regulation. Consider whether funding or other factors impact performance.
2. Identify spill prevention activities being performed by the State either under an agreement with the federal government, or on its own volition, which the federal government could be, but is not, undertaking itself, and which the federal government does not provide funds to Washington to perform. Consider possible federal funds for these activities.

3. Identify spill prevention gaps that exist as a result of lack of funding or as a result of United States v. Locke, et al, 529 U.S. 89 (2000).

### **III. Committee's Proposed Approach to Scope of Work With Specific Recommendations**

The TAC's recommendations presume a substantial amount of up-front work being performed by committee members and staff to prepare a package of relevant information that will form the basis for further study of oil spill prevention in the State of Washington. That study will be performed by a consultant and will include a comprehensive analysis of potential funding sources for oil spill prevention activities.

The up-front work is set forth in Phase One of Tasks One and Two below. The consultant work is set forth in Phase Two of Tasks One and Two below, and in Task Three.

#### **A. Task One - Identify and differentiate between federal spill prevention activities that are required or authorized under law, but are not being effectively performed.**

##### **i. Phase One- Information Collection**

This TAC will utilize existing staff resources, including Oil Spill Advisory Council ("the Council") staff, Department of Ecology ("DOE") staff, the staff of federal agencies assigned to participate with the Council, and U.S. Coast Guard ("USCG") personnel, to gather the information from the federal agencies, the General Accounting Office ("GAO"), and from other relevant sources that emerge. The information received will be compiled into a list of oil spill prevention activities currently authorized or mandated to be performed by the following federal agencies, including, but not limited to:

- USCG;
- U.S. Fish and Wildlife Service;
- U.S. Department of Transportation;
- Office of Pipeline Safety;
- U.S. Minerals Management Service;
- Olympic Coast National Maritime Sanctuary;

- U.S. National Parks Service;
- U.S. Department of Agriculture;
- U.S. Department of Homeland Security;
- U.S. Department of the Interior;
- U.S. Army Corps of Engineers;
- National Marine Fisheries Service; and the
- U.S. Environmental Protection Agency.

In addition, the TAC will obtain from federal agency staff or the GAO information regarding performance measures or other reports that outline oil spill prevention performance measures.

## **ii. Phase Two – Gap Identification**

The information collected in Phase One, above, will be analyzed by an independent outside consultant chosen by the Council.

This analysis will identify the prevention activity gaps between what is authorized and required to be done and what is actually being done; identify specific oil spill prevention activities that are not being performed, even though they are statutorily or otherwise assigned to a particular federal government entity or agency.

The consultant will address the funding source for the relevant activity (those being performed as well as those being ignored), *i.e.*, is the activity funded by Congress and, if so, is the funding adequate for the assigned task or is the agency not managing the task or applying available funds in an appropriate manner (such as leveraging homeland security funds).

The Council could request that the consultant propose criteria against which the Council independently can measure whether the activities assigned to the USCG and other federal agencies are being performed and how well they are being performed.

**A. Task Two - Identify spill prevention activities being performed by the State that are not funded by the federal government and considering possible federal funds for these activities.**

**i. Phase One- Information Collection**

Phase one is to work with DOE and the USCG to identify spill prevention activities being performed by the State through a Memorandum of Understanding (“MOU”) with the USCG.

The TAC will solicit from the State, the oil spill prevention activities being performed or tasked to other State agencies, either by statute or administrative regulation including the:

- Department of Fish and Wildlife;
- Department of Natural Resources;
- Archaeology and Historic Preservation;
- Department of Transportation;
- Department of Health;
- Washington State Patrol;
- Washington State Fire Marshall;
- Washington Military Department Emergency Management Division;
- Washington State Parks;
- Utilities and Transportation Commission;
- Puget Sound Action Team; and
- Northwest Straits Commission.

**ii. Phase Two – Gap Identification**

Phase two is to ask the consultant to perform a secondary task of reviewing the MOU currently in place between USCG and DOE and to recommend to the Council whether it adequately addresses oil spill prevention needs for the State and whether to expand the prevention activities done by DOE under the MOU.

The TAC will also ask the consultant to recommend a strategy to obtain federal or other funding to address the critical prevention activities not being preformed or being preformed ineffectively. In the alternative, the consultant may want to recommend a

funding strategy for activities recommended by the Council as part of a “best practices” oil spill prevention program. Also, this may include recommending federal funding for activities preformed by the State under the MOU with USCG.

**C. Task Three – Gap Analysis and Legal Evaluation**

The TAC recommends that, ultimately, as part of recommending a “state of the art” or “best industry practices” oil spill prevention program, the Council will apply the criteria given by the consultant to measure how well the activities being performed are working to achieve prevention, will identify the protection gaps, will identify the most important gaps to fill, and identify those activities (gaps) not being performed by the State due to perceived preemption issues (see U.S. v. Locke, *infra*).

The TAC recommends that we seek legal assistance from the Attorney General’s Office and Council staff to analyze such gaps and determine whether the state activity could fill the gap or whether federal preemption will bar the State from taking preventive or curative action. This particular charge cannot reasonably be undertaken until the gaps are identified as provided above. The TAC also recommends that the Council adopt a strategy for funding prevention activities in order to fill the prevention gaps.

This TAC anticipates being able to begin working on the tasks set forth above for the TAC in October 2006, and being able to complete the work by February 2007. At that time, the TAC proposes that the Council submit a supplemental report to the Legislature and Governor setting forth a summary of the information collected, a scope of work for the consultant, and an estimated cost for the consulting work. To this end, this TAC recommends that the Council extend this TAC’s life through February 2007.

In summary, the Federal Funding TAC recommends that the TAC continue to meet and to begin work immediately to gather the information readily available from state and federal agencies outlined in this scope of work, and that it use the results of this work to further flesh out and draft a consultant’s scope of work that the Council will review prior to its being included in the Council’s September report.

Of course, it is understood that the extensive analysis recommended as a work product for an independent consultant can only be undertaken when, and if, funds are made available.

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